

**BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND**

LAUREN VOLOSHEN

Complainant

v.

**SLIGO STATION CONDOMINIUM
ASSOCIATION**

Respondent

Case No. 30-11
June 25, 2012

DECISION AND ORDER

The above-captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland (CCOC) for hearing on May 10, 2012, pursuant to Chapter 10B of the Montgomery County Code. Both parties were represented by counsel at the hearing. Based on the parties' evidence and argument and the record herein, the Panel finds, concludes and orders as follows.

I. Background

Complainant Lauren Voloshen ("Complainant" or "Ms. Voloshen"), a resident of Sligo Station Condominium Association ("Respondent" or "Sligo Station"), filed a complaint with the CCOC in June 2011, asserting numerous claims against Respondent. At a pre-hearing conference held in this matter, and again at the hearing itself (in the presence of the parties), counsel for the respective parties gave assurance that they had reached a settlement in principle as to all but one of those claims.

As a result of the settlement, the only issue that was the subject of the May 10 hearing was whether the parking accommodation Respondent provided to Ms. Voloshen on account of her disability was reasonable. The Panel directed the parties to file by May 24, 2012 (later extended to June 8, 2012) a settlement agreement as to the claims that had been settled. The parties have since done so in the form of a Settlement Agreement attached hereto. The agreement is approved and incorporated by reference in this Decision and Order.

CCOC Exhibits 1 and 2 – the CCOC’s administrative file in this matter, including pleadings, communications with the CCOC, interim Panel orders, and Respondent’s governing documents – were admitted in evidence at the hearing over Respondent’s objection. The objection was that the exhibits include numerous ex parte email communications from Ms. Voloshen to the CCOC which are irrelevant and unauthenticated, but prejudicial in their characterizations of Sligo Station and the members of its Board of Directors (Board). The Panel overruled the objection because the Panel is able to disregard irrelevant, unauthenticated and prejudicial evidence.

Ms. Voloshen was the sole witness in her case-in-chief. She offered the following exhibits, which were admitted without objection:

- Cmplt. Ex. 1 – photocopy of a handicap hang tag issued by the Maryland MVA
- Cmplt. Ex. 2 – photo of a parking space occupied by a Volkswagen vehicle
- Cmplt. Ex. 3 – close-up photo of the same space and vehicle
- Cmplt. Ex. 4 – photo of the same space showing illegible painted markings
- Cmplt. Ex. 5 – email dated 1-13-12 with attachments
- Cmplt. Ex. 6 – letter dated 5-2-12 (admitted after the hearing)

Sligo Station called seven witnesses in its case-in-chief: (1) Officer David Quante of the Takoma Park police force; (2) Loretta Garcia, the Enforcement Manager for the Montgomery County Office of Human Rights; (3) Harold Ward, the President of Paul Associates, the current property manager for Sligo Station; (4) Barbara Bull, a Board member who serves as its Vice President and Treasurer; (5) Darlene Morning, a Board member; (6) Eileen Kelly, a unit owner in Ms. Voloshen’s building, but not a current resident; and (7) Katie Britton, a Board member and Sligo Station’s President.

Respondent offered the following exhibits, which were admitted in evidence without objection:

- Rspt. Ex. 1 – photo of space #0001 reserved for Ms. Voloshen, with sign
- Rspt. Ex. 2 – certificate authorizing Ms. Voloshen to park in space #0001
- Rspt. Ex. 3 – Towing Agreement dated 5-3-12
- Rspt. Ex. 4 – email exchanges
- Rspt. Ex. 5 – diagram of entrance to building 609 and associated parking spaces
- Rspt. Ex. 6 – diagram of all entrances and associated spaces

The hearing lasted approximately six hours. At the conclusion of the hearing both parties asked for an award of attorney’s fees. The Panel ordered that the record remain open until May 21, 2012 (later extended to May 24) for the parties to file materials in support of their respective attorney’s fee requests. The Panel has now received and considered those materials.

II. Findings of Fact

The Panel finds the following facts:

1. Sligo Station is a condominium as defined in Md. Code, Real Prop. § 11-101 and it is a common ownership community as defined in Mont. Cnty. Code § 10B-2(b).
2. Sligo Station consists of 36 residential units in Takoma Park, Montgomery County, Maryland. No commercial units are included within the condominium regime.
3. The 36 units are grouped into three adjoining buildings known as 601, 605 and 609 Hudson Avenue, each of which has its own entrance.
4. There are approximately 54 parking spaces constituting part of the general common elements of the condominium regime. Of those, 36 are marked as reserved for residents and the remainder are available for guests and others.
5. Historically, none of the 36 spaces reserved for residents has been assigned to a particular resident. Instead, those spaces have been available to residents on a first come, first served basis.
6. Periodically, the issue of assigning individual spaces to particular residents has been brought before the Sligo Station Board, but the Board has never changed its first come, first served policy.
7. In 2003, when the parking spaces were being re-striped, the painting contractor agreed to paint handicap icons on the three spaces directly in front of the entrances to the three buildings.
8. The three spaces marked with handicap icons are not enforceable handicap spaces, in that they do not satisfy signage requirements applicable to such spaces. As a result, the police will not ticket vehicles parked there even if the vehicles lack handicap insignias.
9. Since 2003, the three handicap icons have faded and they have not been repainted.
10. Ms. Voloshen has resided in a ground floor unit in Building 609 (the "Unit") since 2002. The Unit is subject to Respondent's governing documents.
11. Ms. Voloshen suffers from a disability which occasionally severely limits her ability to walk. She has been issued handicap license plates by the Maryland Motor Vehicle Administration.

12. The Unit is owned by Ms. Voloshen's sister or a company controlled by her sister. Ms. Voloshen's sister bought the Unit for Ms. Voloshen to accommodate her disability.

13. Ms. Voloshen frequently uses the parking space directly in front of the entrance to 609 Hudson Avenue.

14. Occasionally, other vehicles not bearing handicap insignias have used the parking space in front of the entrance to 609 Hudson Avenue, resulting in confrontations between Ms. Voloshen and the drivers of the other vehicles.

15. In late October 2011, Ms. Voloshen returned home in the evening to find another such vehicle parked in the space in front of the entrance to 609 Hudson Avenue. She called the police, but the police officer who responded refused to ticket the vehicle.

16. Ms. Voloshen has had confrontations with others, including Board members, regarding use of the space in front of the entrance to 609 Hudson Avenue, and she has complained to the Board about access to that space.

17. Ms. Voloshen testified to her belief that Board members have occasionally used the space in front of the entrance to 609 Hudson Avenue out of vindictiveness toward her.

18. In late 2011 or early 2012 Ms. Voloshen submitted a written request to Sligo Station for a handicapped parking space. By email dated January 13, 2012 (Cmplt. Ex. 5), Respondent's property manager responded, acknowledging receipt of the request for "a parking space in front of your home and to designate it as a 'handicapped space' for your exclusive use." The response included a one-page form requesting information from Ms. Voloshen's health care provider about Ms. Voloshen's mobility impairment.

19. Ms. Voloshen testified that in her view the mobility impairment form was intrusive and unnecessary, given that she had been issued handicap license plates from the Maryland MVA. Therefore, she did not complete or return the form. She did, however, furnish a letter dated March 5, 2012, from her physician (Cmplt. Ex. 5, p. 4).

20. The March 5, 2012 physician letter confirmed that Ms. Voloshen was under medical care; that she suffers from a disabling medical condition; and that she requires a disability parking space "closest to her private entrance . . . to accommodate her medical needs."

21. Ms. Voloshen contacted the Equal Rights Center (ERC) for assistance in connection with the disability parking issue. By email dated March 13, 2012 from Nathanael Hill of the ERC to Sligo Station's property manager (Rspt. Ex. 4), Mr. Hill wrote:

[I]t is the hope of both the ERC and Ms. Voloshen that Ms. Voloshen's reasonable accommodation request will be implemented with all due haste. Please provide me with the details regarding the SSC's plan to properly identify and designate a parking space (preferably the one previously marked as such) as accessible.

22. The Board voted to provide an accommodation to Ms. Voloshen. Specifically, the Board:

(a) designated the parking space adjacent to and immediately to the left of the space in front of the entrance to 609 Hudson Avenue as her exclusive space, designating it as #0001 (see Rspt. Ex. 5);

(b) issued Ms. Voloshen a certificate authorizing her alone to park in space #0001;

(c) placed a sign at the space stating "Parking for Permit 0001 Only" and stating that others would be towed (see Rspt. Ex. 1); and

(d) entered into a contract with a towing company (Rspt. Ex. 3) authorizing Ms. Voloshen to have any other vehicle in space #0001 towed between the hours of 9 AM and 2 AM.

23. Ms. Voloshen testified that the accommodation she wants is repainting of the handicap icon on the space directly in front of 609 Hudson Avenue. She disputes that the accommodation the Board provided is reasonable because it is more distant from the entrance to 609 Hudson Avenue; because she will be the only resident with a reserved space, thus singling her out and making her a "pariah;" and because she will be required to use only the reserved space and not be able to park in the shade and avoid summertime heat which exacerbates her medical condition.

24. Ms. Voloshen presented no evidence from a health care provider that the accommodation the Board provided will not accommodate her disability.

25. The Board had never faced the issue of reasonable accommodation prior to Ms. Voloshen's request. The Board used Ms. Voloshen's request to develop a general policy for responding to such requests. The Board is now addressing a similar request from another resident.

26. Several Board members and the property manager testified, and the Panel finds, that the Board chose the above-described accommodation, and they rejected the possibility of simply repainting the handicap icon on the space in front of 609 Hudson Avenue, for the following reasons:

(a) Repainting the existing icon would not have made the space an enforceable handicap space, since such spaces must have a sign stating that the space is a handicap space.

(b) It would have been impractical to install a sign at the space in front of the entrance to 609 Hudson Avenue, since it would have to be placed in the sidewalk itself. This would create a danger to pedestrians by partially obstructing the sidewalk. Further, it would cause deterioration of the sidewalk because it would require cutting a hole in the sidewalk.

(c) Even if the space in front of 609 Hudson Avenue could be made an enforceable handicap space, it would not be exclusively for Ms. Voloshen's use, since other vehicles with handicap license plates or hang tags could use it.

(d) The space the Board chose for Ms. Voloshen is for her exclusive use; it is enforceable by towing; it is only one space removed from the space she prefers; and it accommodates the required sign in the grassy area across from the sidewalk.

(e) Providing Ms. Voloshen with an exclusive space and the power to enforce exclusivity should reduce confrontations between Ms. Voloshen and others who park in the unenforceable handicap space and reduce further Board involvement in such confrontations.

27. Ms. Garcia, of the Office of Human Rights, testified that she had been contacted by Ms. Voloshen about the possibility of filing a complaint with the Office, although none was ever filed. According to Ms. Garcia, the Office would not have processed any such complaint given the pendency of Ms. Voloshen's complaint before the CCOC.

III. Conclusions of Law

A. Does the CCOC Have Jurisdiction?

Ms. Voloshen's complaint was very broad, and the issue of parking was perhaps not as clearly stated as it might have been. Nonetheless, the staff's Case Summary identified it as an issue (CCOC Ex. 1, p. 204, Issue 3), the CCOC accepted jurisdiction of it, according to its official minutes posted on its website, and both the initial default order (CCOC Ex. 1, p. 211) and the later summons (CCOC Ex. 1, p. 261) identified it as one of the issues in the dispute. Moreover, both parties addressed and litigated the issue in their pre-hearing filings and they stipulated that the issue was properly before the Panel.

Section 10B-8(4)(A)(iv) of the Montgomery County Code grants jurisdiction to the CCOC over disputes involving the authority of the Respondent to “alter or add to” the common elements. The dispute over the kind of parking Ms. Voloshen is entitled to falls under this section. Dedicating a part of a general common element, such as a parking lot, to the exclusive use of a single resident, is clearly an alteration of the common elements. In addition, the issue falls under Section 10B-8(4)(A)((iii) because the changes requested by Ms. Voloshen raise the issue of whether the Respondent must spend common funds to provide the dedicated parking space she seeks, proper signage being essential to the identification of any space set aside for her.

The CCOC’s organic statute, Chapter 10B of the Montgomery County Code, limits the CCOC’s jurisdiction to certain types of “disputes” between common ownership communities and residents of those communities. Mont. Cnty. Code § 10B-9(a). “Dispute” is defined to include a disagreement involving the authority of a common ownership community to spend its funds or to alter a common element. Mont. Cnty. Code § 10B-8(4). The Panel concludes that the actions taken by the Board in response to Ms. Voloshen’s accommodation request involve the Board’s authority both to expend funds and to alter the condominium’s general common elements. The CCOC therefore has jurisdiction.

At the outset of the hearing, Respondent moved to dismiss the complaint on the ground that the disagreement involved only “the exercise of a governing body’s judgment or discretion in taking or deciding not to take any legally authorized action” – a matter excluded from the CCOC’s jurisdiction. Mont. Cnty. Code § 10B-8(5). This provision effectively adopts the common law business judgment rule. *See Black v. Fox Hills North Community Ass’n, Inc.*, 599 A.2d 1228, 1231 (Md. App. 1992) (the rule “precludes judicial review of a legitimate business decision of an organization, absent fraud or bad faith”). The Panel reserved decision on the motion.

As more fully explained below, the Panel concludes that Sligo Station was obligated under the Fair Housing Act and County law to accommodate Ms. Voloshen’s disability, and that it was not within Sligo Station’s discretion to fail to do so. Nor was its choice between accommodations a discretionary matter since the accommodation Ms. Voloshen wanted would not have complied with the law. In the Panel’s view, therefore, the business judgment rule does not apply here and the motion to dismiss is denied.

A separate question is whether the CCOC *should* take jurisdiction. A CCOC hearing panel is required to “apply state and County laws and all relevant case law to the facts of the dispute” before it. Mont. Cnty. Code § 10B-13(e). County Code § 10B-8(4)(A) also defines a “dispute” in part as a disagreement involving the authority of a governing body, “under any law or association document,” to take or fail to take certain action.

The principal laws on which Ms. Voloshen necessarily bases her claim to an accommodation are the federal Fair Housing Act, 42 U.S.C. § 3601 and following, and the County's anti-discrimination law, Chapter 27 of the Montgomery County Code. Both laws require reasonable accommodation in housing for persons with disabilities/handicaps. In addition, both laws create administrative processes to hear and adjudicate discrimination complaints. 42 U.S.C. §§ 3604(f), 3610; Mont. Cnty. Code §§ 27-2, 27-4, 27-7.

In this case, the central issue is whether Sligo Station provided a reasonable accommodation to Ms. Voloshen. Sligo Station's authority to expend funds and alter a common element are secondary issues. Were this the only consideration, the Panel would defer to the greater expertise and experience of the administrative agencies specifically designated to hear discrimination complaints.

Additional considerations convince the Panel to decide the issue on its merits, rather than deferring. *First*, under both the FHA and the County's anti-discrimination law, the filing of an administrative charge is not the exclusive remedy available to a complainant: both laws also allow a complainant to pursue a civil action. 42 U.S.C. § 3613; Mont. Cnty. Code § 27-9(a). Thus the anti-discrimination laws themselves do not confer exclusive jurisdiction on the respective administrative agencies.

Second, the accommodation issue here is straight-forward, it is readily resolved under controlling legal principles, and it does not call upon any particular expertise or experience.

Third, had Ms. Voloshen filed a formal complaint with the Office of Human Rights, that Office would not have proceeded with the case due to the pendency of the CCOC proceeding.

Finally, this matter has been pending before the CCOC for about one year. The parties have participated in mediation, their counsel have participated in a prehearing conference, and the parties, their attorneys and the Panel have conducted a six-hour evidentiary hearing. To require the parties to start afresh before the Secretary of the U.S. Department of Housing and Urban Development, or the Montgomery County Commission on Human Rights, would result in substantial waste of time and resources.

B. What Law Applies?

As stated above, the Fair Housing Act and the County's anti-discrimination law are the principal authorities on which Ms. Voloshen necessarily bases her claim. The FHA makes it unlawful to "discriminate in the sale or rental [of] . . . a dwelling . . . because of a [person's] handicap," including a "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604. The FHA defines "handicap" as "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h).

In substantially similar language, the Chapter 27 of the County Code prohibits discrimination "against a person with a disability in the sale or rental of housing such as by . . . refusing to make reasonable accommodations necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling." Mont. Cnty. Code § 27-12(i). The Code defines "disability" in part as "a physical or mental impairment that substantially limits one or more of an individual's major life activities." Mont. Cnty. Code § 27-6.

A number of other laws address handicap and accommodation issues, principal among them being the federal Americans With Disabilities Act, 42 U.S.C. § 12101 and following. Since Sligo Station is an existing, private, residential development with no commercial components, it appears to the Panel that the ADA and other laws that incorporate ADA access standards are not applicable here. See Md. Code, Public Safety § 12-202; COMAR § 05.02; and Mont. Cnty. Code § 59-E-2.23.

C. Was the Accommodation Reasonable?

Regulations under the Fair Housing Act, at 24 C.F.R. § 100.204, state:

It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

The Regulations give the following example:

Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be

reserved for him so he will not have to walk very far to get to his apartment. It is a violation of §100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

The Panel concludes that the regulatory example precisely fits this case, making the accommodation provided here reasonable as a matter of law. *Gittleman v. Woodhaven Condo. Ass'n, Inc.*, 972 F.Supp. 894, 897 (D.N.J. 1997). In addition, given the substantial similarity in language between the FHA and the County Code, the Panel concludes that the above example provides authority for interpreting the County Code as well. Mont. Cnty. Code § 27-1(b) ("The prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law").

Pursuant to the Maryland Condominium Act, Md. Code, Real Prop. § 11-109(d), Sligo Station has full authority to accommodate Ms. Voloshen. That section grants to condominium associations the power to "designate parking for individuals with disabilities." The section overcomes any provision in Sligo Station's governing documents that might otherwise require parking spaces to remain as general common elements available on a first come, first served basis. Even without § 11-109(d), federal law likely trumps any restrictions in Sligo Station's governing documents. See *Gittleman*, 972 F.Supp. at 899.

D. May Ms. Voloshen Insist on a Different Accommodation?

It makes sense that the wishes of the handicapped person at least be considered. Under the Americans With Disabilities Act, for example, in the employment context the parties must engage in an "interactive process" to determine what may be a reasonable accommodation by an employer. EEOC Interpretive Guidance, 29 C.F.R. Part 1630 App. Ms. Garcia testified that from the perspective of the Montgomery County Office of Human Rights, when the parties disagree as to the reasonableness of an accommodation, they "negotiate." It was unclear, however, whether Ms. Garcia was speaking about discrimination in housing, or in employment, both of which fall under the jurisdiction of the Office of Human Rights.

The Panel has found no authority addressing whether the interactive process applies under the Fair Housing Act's or the County Code's accommodation requirement. Assuming (without deciding) that it does, any failure of Sligo Station to engage in such a process was harmless in the context of this case. Here, as a practical matter, the

options were limited: provide a proximate space reserved exclusively for Ms. Voloshen, along with an enforcement mechanism (as Sligo Station did); or repaint the slightly closer, non-exclusive and unenforceable handicap space (as Ms. Voloshen wants).

Sligo Station's rationale, involving safety, practicality, enforceability and consistency considerations, was well supported by testimony of its property manager and Board members. Its solution provides Ms. Voloshen with a nearby space exclusively for her use and with an effective enforcement mechanism. Sligo Station also used the opportunity of Ms. Voloshen's accommodation request to develop a general policy for compliance with Fair Housing Act and similar County accessibility requirements.

Ms. Voloshen's solution, on the other hand, would not have provided her with an exclusive space. Installation of a handicap sign at the space she desires, in order to make the space an enforceable handicap space, would have created a pedestrian safety hazard. While Ms. Voloshen's solution would have satisfied her, it would not have satisfied applicable law and it could not serve as a generalized solution for similar accommodation requests. Significantly, the alternative favored by Ms. Voloshen was not supported by any competent medical evidence, but instead turned at least in part on her personal concerns.

We also note that the sign created by the Respondent does not identify the Complainant by name or unit number, but simply by permit number. While this may not totally eliminate possible resentment toward her by other residents, it protects her privacy as much as possible under the circumstances. The fact that the provided space is more distant from the entrance than Complainant prefers is not significant because the added distance is only a few feet. The Complainant herself is willing to park even further away from the entrance to take advantage of shade in the summertime.

E. Should Attorney's Fees Be Awarded?

Chapter 10B permits a hearing panel to award attorney's fees if (paraphrasing the statute) the common ownership community's documents require an award, or if a party has maintained a frivolous dispute in bad faith or has unreasonably delayed the proceeding. Mont. Cnty. Code § 10B-13(d). The parties have not pointed to any provision in Sligo Station's governing documents requiring an award. Instead they have argued the frivolous/bad faith/unreasonable delay prong of the statute.

The Commission has not previously considered a dispute involving handicap parking and disability accommodation, so neither party could easily have known in advance how this particular dispute might be decided. The Panel ultimately concluded that "the issue here is straight-forward . . . [and] it is readily resolved under controlling legal principles," Decision at 8. The Panel reached that conclusion, however, only after hearing six hours

of testimony from eight witnesses, reviewing twelve party exhibits, and researching numerous, potentially applicable laws and regulations.

The fact that the parties were able to reach agreement on all disputes except the parking issue is further evidence of good faith.

At the hearing in this matter, the parties and their counsel conducted themselves professionally and they presented relevant testimony and arguments. There was no bad faith evident at the hearing.

The Panel concludes that an award of attorney's fees to either party is not justified.

IV. Order

Accordingly, it is, this 25th day of June, 2012, ORDERED as follows:

1. The Settlement Agreement attached hereto is approved and made a part of this Decision and Order as if the terms thereof were set forth herein in full.
2. The parking accommodation provided by Respondent Sligo Station Condominium to Complainant Lauren Voloshen is a reasonable accommodation and it shall be maintained by Respondent so long as Complainant resides at 609 Hudson Street and her disability requires such accommodation.
3. Complainant's request for a different parking accommodation is DENIED.
4. Complainant's and Respondent's respective requests for an award of attorney's fees are DENIED.

Panel members Ken Zajic and Helen Whelan concur in this Decision and Order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Charles H. Fleischer, Panel Chair